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SUBRAMANIAM LETCHIMANAN v. THE UNITED STATES OF AMERICA & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
LEE SWEE SENG JCA
B GUNALAN MUNIANDY JCA
[CIVIL APPEAL NOS: W-01(A)-66-01-2020 & W-01(A)-59-01-2020]
18 MAY 2021

C ***ADMINISTRATIVE LAW:*** *Judicial review – Certiorari – Whether Minister wrong in law to refer dispute to Industrial Court – Workman working as security guard dismissed by USA Embassy ('USA') – Whether there was undue delay on Minister's part in making reference – Whether long lapse of time caused serious prejudice to USA – Whether USA's decision to dismiss workman made in its governmental function as sovereign state – Whether sovereign immunity applied –*
D *Whether issues ought to be determined by Industrial Court – Whether judicial review application premature – Whether ran contrary to scheme of Industrial Relations Act 1967 and basic principles of judicial review – Whether Minister's reference tainted with illegality, irrationality or procedural impropriety*

E ***LABOUR LAW:*** *Industrial Court – Jurisdiction – Workman working as security guard dismissed by USA Embassy ('USA') – Whether USA's decision to dismiss workman made in its governmental function as sovereign state – Whether sovereign immunity applied – Whether issues ought to be determined by Industrial Court – Industrial Relations Act 1967, s. 29(g)*

F ***LABOUR LAW:*** *Employment – Dismissal – Workman working as security guard dismissed by USA Embassy ('USA') – Whether USA's decision to dismiss workman made in its governmental function as sovereign state – Whether sovereign immunity applied – Whether issues ought to be determined by Industrial Court – Industrial Relations Act 1967, s. 29(g)*

G These combined appeals raised the question as to whether the principle of restrictive immunity applied in the context of the dismissal of a workman, engaged as a security guard, in a reference by the Minister of Human Resource ('Minister') to the Industrial Court under s. 20 of the Industrial Relations Act 1967 ('IRA') where the employer was a sovereign state in the
H United States of America ('USA'). The appellant ('workman'), a Malaysian, had been working as a security guard for the USA Embassy since 20 September 1998. On 4 April 2008, he received a phone call from an official of the Embassy that his employment had been terminated. The workman wrote to the Embassy but received no reply. The workman duly filed a representation under s. 20(1) of the IRA with the Director General of
I Industrial Relations ('DGIR') at the Kuala Lumpur Industrial Relations Department. He complained that he was locked out of the Embassy since 7 April 2008 without being given a written notice and that he had been

unlawfully dismissed. The workman felt aggrieved that after serving for more than ten years he was terminated without notice and with no reasons given. On 28 September 2018, a letter from the DGIR called for a conciliation meeting. The Embassy and the workman were present but there was no settlement reached. Unbeknown to the workman, the Embassy had sent a representation to the DGIR arguing that sovereign immunity applied and that the matter should not be referred at all to the Industrial Court. The Minister was subsequently informed by the DGIR that there was no resolution of the dispute between the workman and the Embassy. After considering the representations of the parties, the Minister decided to refer the matter to the Industrial Court ('reference.'). The USA then made the challenge by way of a judicial review application to the High Court arguing that state immunity applied and that the Minister was wrong in law to have referred the dispute to the Industrial Court. The High Court granted the *certiorari*, prohibition and declaration prayed for by the USA and held, *inter alia*, that the doctrine of sovereign immunity was applicable. It was argued by the Senior Federal Counsel ('SFC') that instead of deciding whether there was a question of fact and law that should be referred by the Minister to the Industrial Court for adjudication in the light of the dispute not being resolved at the DGIR's level, the High Court Judge ('HCJ') had erroneously proceeded to identify the questions of mixed facts and law and decided them accordingly in his grounds of judgment. Both the workman and the Minister appealed to the Court of Appeal against the said decision. The issues that arose were (i) whether there was undue delay on the part of the Minister in making the reference in that the long lapse of time had caused serious prejudice to the USA; (ii) whether the dismissal of the workman as a security guard was a decision of the USA made in its governmental function as a sovereign state and not a private or commercial matter and, as such, was entitled to sovereign immunity from a reference by the Minister; (iii) whether the Minister's reference was tainted with illegality, irrationality or procedural impropriety that it ought to be quashed.

Held (allowing appeals)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) The Minister only made the reference to the Industrial Court after some 11 years had lapsed from the time of the representation by the workman. To be fair to the Minister, he acted quite promptly after receiving a report from the DGIR that the dispute could not be resolved amicably. The USA had made a written representation on 22 March 2019 to the DGIR, and the Minister having subsequently received a report from the DGIR, had on 22 April 2019 made the reference to the Industrial Court. The USA had not stated how it had been prejudiced by the delay. The workman was equally not to be blamed for the delay for he too had not contributed to it. After both sides were content to wait for so long a time

for whatever reason, it was now not open to either of them to raise delay as an issue in quashing a decision that was not in its favour. (paras 19, 20, 23, 26, & 35)

(2) To decide not to decide does not augur well for a system of resolving industrial disputes where, if there is no resolution at the DGIR's level, it must then be escalated to the Minister's level where, unless the claim for unlawful dismissal was totally frivolous and a complete nuisance, seeing that there are issues of fact and law or mixture of fact and law to be decided on, he should refer the dispute to the Industrial Court. Fortunately, the latest amendment to the IRA makes it mandatory for the DGIR to refer the dispute to the Industrial Court if he is satisfied that there is no likelihood of the representation being settled. Thus, the ground of quashing the reference of the Minister on account of undue delay causing prejudice to the USA must fail. (paras 36, 37 & 39)

(3) In essence, the restrictive doctrine of sovereign immunity is a judicial recognition that there are certain private acts of a State are such that by the very nature of the act itself, the State's dignity will not be challenged even when the very act is subjected to review or adjudication by a local court. Here, the act of a dismissal of a security guard had to be considered by the Industrial Court as to whether it was an act falling within an act of sovereignty or government act of the State such that for the Industrial Court to adjudicate it would be an interference with its sovereign function. The evidence could only be more properly adduced at the Industrial Court where the matter would be heard and parties may cross-examine each other on the exact nature of the workman's employment and the act of dismissal. What was in the judicial review application were averments which were being contradicted by the workman with respect to the nature of his employment or even the act of his dismissal as falling within or without the State's sovereign or governmental functions or whether these were more in the nature of a private employment contract and an alleged breach of its terms and the applicability of the IRA to determine whether the dismissal was for a just cause and excuse. (paras 52, 53 & 56)

(4) The USA had challenged by way of a judicial review application the decision of the Minister to refer the matter to the Industrial Court. That was rather premature at this stage. It was different if the Industrial Court had decided against the USA and the matter was then brought to the High Court by a judicial review application and then to the Court of Appeal upon an appeal from the High Court's decision. At this stage of judicial review, this court did not have the answer to the question as to whether the dismissal of the workman as a security guard was a decision of the USA made in its governmental function as a sovereign state and not a private or commercial matter and as such was entitled to sovereign immunity from a reference by the Minister. The facts have to be

determined by the Industrial Court for the proper result to be had by the application of the law. That was a question that the Industrial Court, under our statutory scheme of a speedy adjudication of an industrial dispute under the IRA, has been reserved by Parliament to decide. (paras 110, 111 & 122-124)

(5) At the Industrial Court, its Chairman has the power under s. 29(g) of the IRA to 'generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it' including deciding on a preliminary issue as to whether State immunity would apply based on the nature and duties of the claimant's employment as a security guard. The Industrial Court, as was the case with Employment Tribunals in other jurisdictions, has the duty to embark on a fact-finding to determine if the defence of State immunity applied to exclude the jurisdiction of the court or Tribunal. The USA in their own O. 53 statement acknowledged that the question of sovereign immunity involved factual issues, requiring among others an inquiry into the function of the workman's position in the USA embassy to determine whether the dismissal fell within the sphere of Government or sovereign activity. It would be premature and putting the cart before the horse for a party to seek an order to prohibit the Industrial Court from hearing the reference before it makes a determination on the jurisdictional question. If a party is aggrieved, the proper recourse is to apply for judicial review against the Industrial Court after the Industrial Court has made a determination on that question. In this case, what The USA had invited the High Court to do was in effect to take over the function of a specialised statutory tribunal, and to determine the serious question of fact and law at first instance to the exclusion of the Industrial Court. Such an approach ran contrary to the scheme of the IRA and the basic principles of judicial review. (paras 169-173)

(6) All that the Minister had done by reference, appreciating that he is not in a position to determine even that issue in the overall context of a claim for dismissal without just cause and excuse, was to let the Industrial Court decide. The Industrial Court Chairmen are all legally trained and have practical experience in the law and are competent enough to decide on the issue of whether absolute or restrictive sovereign immunity applied to the act of dismissal of the workman. The reference by the Minister under s. 20(3) of the IRA does not determine the question of immunity one way or another; it merely confers a threshold jurisdiction upon the Industrial Court to look into the representation and the serious issues it involves. The appropriate and only forum to determine the issue of immunity is the Industrial Court as a matter of first instance upon a reference by the Minister. The Minister has no axe to grind nor bone to pick up with anyone in the

reference and certainly not with the USA. As no right to be heard was accorded to the workman, it was only fair and right that he be given this right in the Industrial Court. (paras 183 & 184)

(7) At this juncture, it was not part of the function of the High Court to jump the gun and determine the question of immunity for itself. The High Court is 'obliged to resist any temptation to convert (its) jurisdiction to review onto a reconsideration of the merits as if on appeal.' The test as applied in the case of *Minister of Labour, Malaysia v. Lie Seng Fatt* was still good when it held that 'there is no question that the power of the Minister under s. 20(3) of the Act is wide and the language used by the legislature would seem to confer on the Minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case provided of course he had acted *bona fide*, that is without an improper motive, and he has not taken into account extraneous or irrelevant matters. He has an unfettered discretion but should not be exercised so as to frustrate the object of the statute itself.' This approach was both sensible and sound and indeed time-saving for as it was, the matter even before it could start in the Industrial Court, had been brought to the High Court and then to the Court of Appeal and now to the Federal Court to seek leave to appeal to. The referral of the Minister could not be said to be tainted with illegality, irrationality or procedural impropriety. (paras 194, 196 & 197)

Case(s) referred to:

Alvarez Mitre v. United States, First Collegiate Court of the Seventeenth Circuit [T.C.C.] ***(refd)***

Anonymous v. United States Government, Misc Civil Motion 1137/10 ***(refd)***

Assunta Hospital v. Dr A Dutt [1980] 1 LNS 121 FC ***(refd)***

Bah v. Libyan Embassy 2006 2006(1) BLR 22 (IC) ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Benkharbouche v. Embassy of Republic of Sudan [2019] AC 777 ***(refd)***

British High Commission v. Jansen [2015] 3 LRC 565 ***(refd)***

Chu Siew Mei @ Karen v. Ketua Pengarah Perhubungan Perusahan (Kuala Lumpur High Court Judicial Review No. 25-71-03-2014) (Unreported) ***(refd)***

Chung Chi Cheung v. The King [1939] AC 160 ***(refd)***

Commonwealth Of Australia v. Midford (M) Sdn Bhd & Anor [1990] 1 CLJ 878; [1990] 1 CLJ (Rep) 77 SC ***(refd)***

Cudak v. Lithuania (2010) 42 EHRR 15 ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***

Dube and Another v. American Embassy and Another 2012 2 BLR 98 (IC) ***(refd)***

Enesty Sdn Bhd v. Transport Workers Union & Anor [1985] 1 LNS 148 FC ***(refd)***

Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors [2007] 2 CLJ 97 FC ***(refd)***

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] 1 LNS 156 FC ***(refd)***

Hii Yii Ann v. Deputy Commissioner Of Taxation Of The Commonwealth Of Australia & Ors [2017] 10 CLJ 743 HC ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***
Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(refd)***
Kumpulan Guthrie Sdn Bhd v. The Minister of Labour & Manpower & Ors [1986] 1 CLJ 566; [1986] CLJ (Rep) 426 HC ***(refd)***
Menteri Sumber Manusia v. John Hancock Life Insurance (Malaysia) Bhd & Another Appeal [2007] 1 CLJ 366 CA ***(refd)***
Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***
Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***
Mr N Buttet v. Ambassade de France Au Royaume Uni Case Number: 2204921/2012 ***(refd)***
National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower [1980] 1 LNS 50 FC ***(refd)***
R v. Fulham, Hammersmith and Kensington Rent T ribunal, ex p Zerek [1951] 2 KB 1 ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Sengupta v. Republic of India [1983] ICCR 221 ***(refd)***
Sostrand v. United States of America, Case No. 14-111748 TVI-OTIR/05 ***(refd)***
Stefanov v. United States of America, Civil Case 24509/2010 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
The 'I Congreso Del Partido [1983] 1 AC 244 ***(refd)***
The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes' (1993) 16 UNSWLJ 363 ***(refd)***
The Embassy Interpreter Dismissal Case [Case No. 04/01/0260-11] ***(refd)***
The Embassy Of Libya v. Menteri Sumber Manusia Malaysia & Ors [2019] 1 LNS 752 HC ***(refd)***
The Government of Canada v. The Employment Appeals Tribunal and Burke 95 ILR 467 ***(refd)***
TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications [2019] 10 CLJ 436 FC ***(refd)***
Van Schoten v. United States of America, 8 Sa 664/16 ***(refd)***

Legislation referred to:
Federal Constitution, art. 5
Human Rights Commission of Malaysia Act 1999, s. 4(4)
Industrial Relations Act 1967, ss. 20(1), (2), (3), 29(g), 30(1), (3), (5), 55

Other source(s) referred to:
The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes' (1993) 16 UNSWLJ 363, p 366

For the appellant minister - Liew Horng Bin; SFC
For the appellant workman - Ragunath Kesavan & Merie Chen Mong Yi; M/s Kesavan
For the respondent The United States of America - Lim Heng Seng, Amardeep Singh & Tan Wei Wenn; M/s Lee Hishamuddin Allen & Gledhill

[Editor's note: For the High Court judgment, please see The United States Of America v. Menteri Sumber Manusia Malaysia & Ors [2020] 7 CLJ 210 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Lee Swee Seng JCA:

[1] These combined appeals raise the intriguing question as to whether the principle of restrictive immunity applies in the context of the dismissal of a
B workman, engaged as a security guard, in a reference by the Minister to the Industrial Court under s. 20 of the Industrial Relations Act 1967 ("IRA") where the employer is a sovereign state in The United States of America ("The USA").

[2] The USA had made the challenge by way of a judicial review
C application to the High Court arguing that State immunity applied and that the Minister of Human Resource ("Minister") was wrong in law to have referred the dispute to the Industrial Court. At the High Court, the Minister was the first respondent, the Industrial Court was the second respondent and the workman was the third respondent.

D **[3]** The USA had prayed for a *certiorari* to quash the reference by the Minister and a prohibition against the Industrial Court from adjudicating the Minister's reference. There was also a prayer for a declaration that the workman and The USA and its Embassy are immune from the jurisdiction of the Industrial Court.

E **[4]** The High Court agreed with The USA and granted the reliefs as prayed and ordered costs of RM6,000 each to be paid by the workman and the Minister.

[5] Both the workman, Subramaniam a/l Letchimanan and the Minister
F had appealed to this court and both appeals were heard together.

[6] The appellants shall be referred to as the "workman" or the Minister as the case may be and The USA as the respondent for all practical purposes though the workman is also third respondent in the Minister's appeal to this court and the sole respondent in the workman's appeal.

G **Background Facts**

[7] The workman, a Malaysian, had been working as a security guard for The USA Embassy since 20 September 1998. For all intents and purposes, the respondent accepted the fact that The USA is the employer here, taking
H the stand that the Embassy is not a legal entity as such. On that fateful day on 4 April 2008, he received a phone call from an official of the Embassy that his employment had been terminated. No reasons were given.

[8] The workman thought he should at least be informed of the reasons for being sacked and so he wrote to the Embassy by his letter of 8 April 2008
I but was disappointed to receive no reply. He thought he should lodge a police report to show his seriousness in pursuing justice and to accurately put on record what had happened to him. The police report on what he deemed as unlawful dismissal was lodged on 17 May 2008.

[9] He must have enquired about his rights, for on 23 May 2008 he duly filed a representation under s. 20(1) of the IRA with the Director General of Industrial Relations ("DGIR") at the Kuala Lumpur Industrial Relations Department. He complained that he was locked out of the Embassy since 7 April 2008 without being given a written notice and that he had been unlawfully dismissed.

[10] He said he had been victimised by another staff named Rama who had tried to tarnish his good record as he had raised the matter of unreasonable management of the security post. He felt aggrieved that after serving for more than ten years, he was terminated without notice and with no reasons given. He said he could not believe that the US Embassy that is recognised the world over as the champion of human rights could have done this to a security guard like him.

[11] There was a long languishing silence lasting some ten years! Nobody involved and interested in this case, heard anything from anyone. It is always difficult to interpret silence. That silence was broken with a letter from the DGIR office calling for a conciliation meeting on 28 September 2018. The Embassy was present through its representative and the workman was also present at the Kuala Lumpur Industrial Relations Department. There was no settlement reached.

[12]` Unbeknown to the workman, the Embassy had on 22 March 2019 sent a representation to the DGIR arguing that sovereign immunity applied and that the matter should not be referred at all to the Industrial Court.

[13] The Minister was subsequently informed by the DGIR that there was no resolution of the dispute between the workman and the Embassy. After considering the representations of the parties, the Minister decided to refer the matter to the Industrial Court ("the reference"). The reference was made on 22 April 2019.

[14] That prompted The USA to make an application for judicial review with which the High Court agreed.

[15] It was argued by the learned Senior Federal Counsel ("SFC") that instead of deciding whether there was a question of fact and law that should be referred by the Minister to the Industrial Court for adjudication in the light of the dispute not being resolved at the DGIR's level, the learned High Court Judge had erroneously proceeded to identify the following questions of mixed facts and law and decided them accordingly in his grounds of judgment ("GOJ") as follows:

> [16] Reverting to the present case, the core issue here is whether the applicant and its embassy is immune from the jurisdiction of the industrial Court with regards to the 3rd respondent's reinstatement claim on the principle of sovereign immunity
>
> ...

A [23] The next pertinent issue is the application of this doctrine in Malaysia.

...

[26] The next question here is whether the doctrine is applicable in the present case

B

[16] In granting the *certiorari*, prohibition and declaration prayed for, the learned High Court Judge held as follows in his GOJ:

[31] Clearly, a security guard's duty is an integral to the sovereign activity of the state and its embassy not only to provide security but to maintain the inviolability of the embassy's premises. This cannot be considered as merely auxiliary.

C

[32] In the instant case, the dismissal of the 3rd respondent by the applicant was in the exercise of its sovereign authority (*jure imperii*) and as such the doctrine of sovereign immunity is applicable. Consequently, the Industrial Court has no jurisdiction to hear the 3rd respondent's representation.

D

[17] Both the workman and the Minister had appealed to us in the Court of Appeal and the grounds of appeal straddled each other and may be compendiously considered under the issues below.

E **Whether There Was Undue Delay On The Part Of The Minister In Making The Reference In That The Long Lapse Of Time Had Caused Serious Prejudice To The USA**

[18] This issue of delay as a ground for quashing the reference transcends the issue of sovereign immunity raised by the respondent, The USA in the High Court below and shall be considered at the outset in this judgment.

F

[19] It cannot be denied that the Minister only made the reference to the Industrial Court after some 11 years had lapsed from the time of the representation by the workman. The learned High Court Judge was convinced and persuaded by the prejudice point raised by The USA and he held at para. 40 of the grounds of judgment ("GOJ") as follows:

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In the present case 11 years is an inordinate and unexplained delay would only prejudice the applicant if the 3rd respondent's representation is to be adjudicated by the Industrial Court.

H **[20]** To be fair to the Minister, he acted quite promptly after receiving a report from the DGIR that the dispute could not be resolved amicably. The USA had made a written representation on 22 March 2019 to the DGIR and the Minister having subsequently received a report from the DGIR, had on 22 April 2019, made the reference to the Industrial Court.

I **[21]** In a perfectly imperfect world, files do fall through the cracks and some may even go to sleep. The problem seemed to have arisen at the end of the DGIR and the Ministry of Foreign Affairs and way before the new

Minister who made the reference was appointed for the Honourable Minister was only appointed on 21 May 2018 after a new Government came to power and with that a new Cabinet. However, we are ever conscious of the brooding omnipresence of the aphorism that the buck stops here and that though the problem was inherited by the Minister, he remained responsible for the sore point in the lack of action that led to the lamentably late action by the DGIR in referring the dispute to the Minister.

[22] There is no time frame between the reference to the DGIR and his reference to the Minister for the Minister's reference to the Industrial Court. Be that as it may, we accept the proposition that it must be done with all due dispatch for memory fades with the passage of time and in an ordinary case where limitation applies, it would be statute-barred already.

[23] The USA had not stated how it had been prejudiced by the delay. Here is where we would have to consider relative prejudice where the workman is concerned, having regard to the fact that the IRA is clearly a piece of social legislation designed to help dismissed workman pursue a remedy that is both cheap and quick where no order for costs is made against the workman even if he be unsuccessful in his claim for reinstatement or compensation *in lieu* of reinstatement.

[24] We heard learned counsel for The USA that his client had not at all contributed to the delay as opposed to the case of *Kumpulan Guthrie Sdn. Bhd. v. The Minister of Labour & Manpower & Ors* [1986] 1 CLJ 566; [1986] CLJ (Rep) 426 where 28 months delay after the dismissal was not considered to be fatal.

[25] The High Court in *Kumpulan Guthrie*'s case (*supra*) dismissed the judicial review application for a *certiorari* to quash the Minister's reference as the applicant had by his own conduct contributed to the delay and the parties were keen to settle their case. However, it held that under normal circumstances, the period of 28 months taken by the Minister before referring the representation to the Industrial Court would have been an unwarranted delay which would be prejudicial to the applicant. What was said was clearly *obiter* in that case.

[26] We have to look at the big picture. The workman is equally not to be blamed for the delay for he too had not contributed to it. In fact, we would say generally it would be the dismissed workman that suffers more for in the in-between time he would have to fend for himself whilst the business of the employer would continue as usual. It is relatively easy for an employer to get a replacement security guard but for a dismissed security guard to get another job would not be that simple.

[27] Being a sole and solitary soul, he needs to summon the courage to take on, as it were, the whole might and valour of a sovereign state in nothing less than The USA.

[28] Then there was the sorry state of the state machinery in the Ministry of Human Resource and that of the Ministry of Foreign Affairs that appeared to have been caught in the doldrums of indecision, neither referring nor not referring the unresolved dispute to the Minister of Human Resource and everyone being content to pass placidly by the affairs of each day without "disturbing" so to speak from its slumber this hot potato file.

[29] Much as we deplore the delay caused by sheer lethargy in making a decision not to make a decision, credit must be given to the new Minister, who when he came on board, acted with all due diligence to refer the matter to the Industrial Court within a month of getting the report from the DGIR that the dispute could not be resolved.

[30] Here is a case where the workman could do nothing but patiently wait and he could well have waited longer if the winds of change had not blown in the corridors of the Ministry of Human Resource.

[31] He lacks the resources to apply for a *mandamus* to compel the DGIR to call for a conciliation meeting under the IRA or the Minister to make a decision on the reference whilst The USA may have the resources for such an application if it should find the wait agonisingly long and unbearably uncertain to the extent of undue prejudice that it is made to suffer through no fault of its own.

[32] The USA had the resources at its disposal to make such an application if it is of the view that its sovereign dignity and integrity is being assaulted by a security guard's representation to the DGIR on account of his dismissal without just cause and excuse.

[33] Both were resigned to waiting for a response from the DGIR and ultimately from the Minister as to whether to make the reference or not at all. No news may be good news for those accustomed to waiting but to the dismissed workman, he had no practical choice but to wait and in the meanwhile to find another job to keep body and soul together.

[34] Things would become clearer if we were to ask the question as to who would be objecting if the long-awaited reply from the Minister is not to make the reference to the Industrial Court. Clearly, it would be the workman for all his rights would end with the decision of the Minister not to make the reference unless he is prepared to proceed with judicial review of the Minister's refusal to make the reference. Surely The USA is not going to object on ground of principle that though the decision was a right one yet, it cannot be sustained on account that the undue delay had caused serious prejudice to the workman.

[35] It hardly therefore needs to be said that after both sides were content to wait for so long a time for whatever reason, it is now not open to either of them to raise delay as an issue in quashing a decision that is not in its favour.

[36] Granted the long delay is inexcusable and indeed deplorable, yet this is a case where it is better late than never though better never late! We must observe that to decide not to decide does not augur well for a system of resolving industrial disputes where if there is no resolution at the DGIR's level, it must then be escalated to the Minister's level where unless the claim for unlawful dismissal is totally frivolous and a complete nuisance, seeing that there are issues of fact and law or mixture of fact and law to be decided on, he should refer the dispute to the Industrial Court.

[37] Fortunately, this problem would now be relegated to the past for the latest amendment to the IRA makes it mandatory for the DGIR to refer the dispute to the Industrial Court if he is satisfied that there is no likelihood of the representation being settled.

[38] The amended s. 20 of the IRA as amended by the Industrial Relations (Amendment) Act 2020 (Act A1615) which amendment to s. 20 came into force on 1 January 2021 reads as follows:

> **20. Representations on dismissals**
>
> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> (1a) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:
>
> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.
>
> (2) Upon receipt of the representations **the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at**.
>
> [(2) Am. Act A1615: s. 12]
>
> (3) Where the Director General is **satisfied that there is no likelihood of the representations being settled** under subsection (2), **the Director General shall refer the representations to the Court for an award**.
>
> [(3) Ins. Act A1615: s. 12] (emphasis added)

[39] This ground of quashing the reference of the Minister on account of undue delay causing prejudice to The USA must, in our considered view, fail.

Whether The Dismissal Of The Workman As A Security Guard Was A Decision Of The USA Made In Its Governmental Function As A Sovereign State And Not A Private Or Commercial Matter And As Such Is Entitled To Sovereign Immunity From A Reference By The Minister

[40] That very question itself is a serious question of fact and law for the Minister to see it fit to make the reference to the Industrial Court. The issue can only be decided after the relevant facts have been ascertained.

[41] To avoid much dissipation of time and resources, the respondent here can always ask for that issue to be dealt with as a preliminary issue such that if the Industrial Court should hold that sovereign immunity should apply, then the matter ends there and the Industrial Court would not have to further proceed with the issue of whether the dismissal was without just cause and excuse.

[42] The law of sovereign immunity cannot be applied in a vacuum as both sides agreed that what is applicable here is the doctrine of restrictive immunity and not that of absolute immunity as was originally developed. As explained in *Hii Yii Ann v. Deputy Commissioner Of Taxation Of The Commonwealth Of Australia & Ors* [2017] 10 CLJ 743; [2018] 7 MLJ 393 at pp. 758-759 (CLJ); p. 410 (MLJ) the doctrine of sovereign immunity states as follows:

> [48] The doctrine of sovereign immunity (or state immunity) is an integral principle of international law which was developed out of the principle *par in parem non habet imperium*. Thus, under that principle one state shall not be subject to the jurisdiction of another state. Sovereign immunity may be claimed by the state and its servants and agents. Hence where a suit is brought against the servants or agents of a foreign state, the state is entitled to claim immunity for its servants or agents as it could, if sued itself.

[43] In the case of restrictive immunity, it is not all acts of the sovereign foreign State that is immune from legal action but only those acts that are primarily and peculiarly governmental or diplomatic in nature and character, or for example touching as it is on the legislative or international transactions of a foreign Government, or the policy of its Executive.

[44] That in Malaysia, the doctrine of restrictive immunity rather than absolute immunity applies had been settled by the Supreme Court case of *Commonwealth Of Australia v. Midford (M) Sdn Bhd & Anor* [1990] 1 CLJ 878; [1990] 1 CLJ (Rep) 77; [1990] 1 MLJ 475 at p. 477 where it adopted the explanation of "restrictive doctrine of sovereign immunity" as explained by Lord Wilberforce in the case of *The 'I Congreso Del Partido* [1983] 1 AC 244 as follows:

We now refer to some of the submissions of Mr Abraham on the concept of the restrictive theory of sovereign immunity. Counsel referred us to the following passages in the judgment of Lord Wilberforce in *The 'I Congreso Del Partido'* [1983] 1 AC 244:

> The question arises, therefore, what is the position where the act upon which the claim is founded is quite outside the commercial, or private law, activity in which the state has engaged, and has the character of an act done *jure imperii*. *The 'restrictive' theory does not and could not deny capability of a state to resort to sovereign or governmental action: it merely asserts that acts done within the trading or commercial activity are not immune. The inquiry still has to be made whether they were within or outside that activity*. (emphasis added)

[45] At p. 80 (CLJ); p. 477 (MLJ) of the *Midford*'s case (*supra*) the Supreme Court applied the test laid down by Lord Edmund-Davies in *The 'I Congreso Del Partido's* case [1983] 1 AC 244 as follows:

> He concluded that it was clear from those authorities that it was difficult to formulate a clear-cut distinction between the two concepts but pointed out that a useful guide could be found in the following passage of the judgment of Lord Edmund-Davies in *The 'I Congreso'* case [1983] 1 AC 244:
>
> > I approach the application of the restricted doctrine of state immunity upon the following basic principles:
> >
> > (ii) That propounded in the *Empire of Iran* case 45 ILR 57 80 that: "As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather **refer to the nature of the state transaction or the resulting legal relationships**, and not to the motive or purpose of the state activity. It thus depends on whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law. (emphasis added)

[46] The Supreme Court went on to observe at pp. 84 & 85 (CLJ); p. 480 (MLJ) as follows:

> **We are therefore of the view that the restrictive doctrine should apply here** although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country. (emphasis added)

[47] In *Hii Yii Ann*'s case (*supra*) the learned judge Nantha Balan J (now JCA) rightly reiterated at p. 759 (CLJ); p. 410 (MLJ) that:

> In Malaysia, the courts have adopted the theory of 'restricted' sovereign immunity rather than absolute sovereign immunity ... However, the absolute sovereign immunity theory is no longer applicable and the position now as enunciated in the *Midford* case, is that **in Malaysia, the courts are to apply the restrictive sovereign immunity approach**.
>
> (emphasis added)

[48] Actions of a foreign State that are of a pure commercial or private law nature are not immune from legal challenge by those parties affected by it, for it does not offend the dignity of the foreign State and indeed it behooves all foreign States to comply with the law of the jurisdiction of the receiving State as promoting and not undermining the rule of law and the due deference granted to each other's legal system which may well differ between one State and another though the norms of justice, fairness and reasonableness are universal.

[49] It thus boils down to the nature of the dispute and the following passage by Justice Nantha Balan J (now JCA) in *Hii Yii Ann*'s case (*supra*) would help in determining the right test to be applied as follows at p. 762 (CLJ); p. 413 (MLJ):

> Thus, the imperative question for the court in the present context is: **whether the act(s) of the defendants are of a governmental nature and character or whether they are commercial in nature**. In this regard, it is relevant to quote Lord Denning in *Rahimtoola v. H E H The Nizam of Hyderabad and Others* [1958] AC 379 at p. 422 where he described the theory of sovereign immunity and the test, in the following terms: Applying this principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on **the nature of the dispute**. Not on whether 'conflicting rights have to be decided', but on the nature of the conflict. Is it properly cognisable by our courts or not? **If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so**, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried out by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity. (emphasis added)

[50] As submitted by learned counsel for the workman, the restrictive immunity doctrine is based on a distinction between acts *jure imperii* and acts *jure gestionis*. The former are those acts of a sovereign or governmental in nature which no private person would ordinarily perform, whereas the latter are those acts which could be performed by a private party.

[51] To appreciate the applicability of the doctrine of restrictive immunity, one must appreciate the rationale behind it and why an act of a private nature is excluded from immunity. Lord Wilberforce in *The 'I Congreso Del Partido* [1981] 2 All ER 1064 at p. 1070 explained it with characteristic clarity as follows:

> The relevant exception, or limitation, which has been engrafted on the principle of immunity of states, under the so-called restrictive theory, arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations. (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) *To require a state to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state nor any interference with its sovereign functions.*
>
> (emphasis added)

[52] We agree with learned counsel for the workman that, in essence, the restrictive doctrine of sovereign immunity is a judicial recognition that there are certain private acts of a State are such that by the very nature of the act itself, the State's dignity will not be challenged even when the very act is subjected to review or adjudication by a local court.

[53] Here, the act of dismissal of a security guard has to be considered by the Industrial Court as to whether it is an act falling within an act of sovereignty or Government act of the State such that for the Industrial Court to adjudicate it would be an interference with its sovereign function.

[54] Learned counsel for the workman stated that the act of dismissal is purely a contractual dispute in the field of private law and even if one chooses to go by the nature of his office, the workman is a security guard discharging duties of a purely menial nature and there is no evidence that he was involved in handling state secrets of the respondent.

[55] In summary then the nature of the dispute is employment and the applicable law is that of private law particularly that of employment law which is very much contract law and the relationship between the parties is that of an employer-employee. On the surface at least, the act of dismissal is bereft of the element of legislative or international transactions of a foreign Government or the policy of its Executive.

[56] Whatever it is, the evidence could only be more properly adduced at the Industrial Court where the matter would be heard and parties may cross-examine each other on the exact nature of the workman's employment and the act of dismissal. What we have in the judicial review application are averments which are being contradicted by the workman with respect to the nature of his employment or even the act of his dismissal as falling within or without the State's sovereign or governmental functions or whether these are more in the nature of a private employment contract and an alleged breach of its terms and the applicability of the IRA to determine whether the dismissal is for a just cause and excuse.

[57] Learned counsel for the workman referred to a Botswana case of *Bah v. Libyan Embassy* 2006 2006(1) BLR 22 (IC) and being a common law country, its decision would be of some assistance to our courts here tasked with deciding on the same issue.

[58] In that case, Bah the applicant was an employee at the Libyan Embassy in Botswana. Bah brought an action against the Libyan Embassy after he was dismissed from his employment. The issue arose is similar to our present case, ie whether the Libyan Embassy is immune. In holding that the Libyan Embassy is not immune, the court in this case held as follows:

> The distinction between *jus imperii* and *jure gestiones* is important because it determines the nature of conduct, acts or transactions for which a state is entitled to claim jurisdictional immunity. ...
>
> On the basis of the authorities cited above, I have no hesitation whatsoever in holding that an action and or legal suit arising out of breach of the employment contract and or Employment Act involves a private law transaction and is justiciable.
>
> *In my considered view there is no reason why the respondent should be immune from a legal suit of this nature. The applicant in this matter is not in any way challenging a governmental act, but is merely seeking compliance with the Employment Act in so far as he is merely claiming payment of severance pay, notice pay and the payment of wrongfully withheld wages. The proceedings do not in any way assault the dignity of the respondent*. (emphasis added)

[59] The court continued as follows:

> In my view the respondent would have done itself some good if it had cooperated and submitted itself to the jurisdiction of this court. To this extent, I agree with the *dictum* of Denning MR in *Rahimoola v. Nizam of Hyderabad and Another* [1958] AC 379 at p 418 when he said: *'It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction ... I would go further and suggest there is a duty of diplomatic missions or embassies to respect the laws of the receiving State, for to do otherwise may undermine the rule of law of the receiving state*. (emphasis added)

[60] There was a subsequent Botswana case in *Dube and Another v American Embassy and Another* 2012 2 BLR 98 (IC) where the court held as follows:

> ... it is clear that the doctrine of sovereign immunity applicable in Botswana is that of restrictive immunity as opposed to absolute immunity. In other words, a foreign sovereign enjoys immunity from suit and legal process where the relevant act which forms the basis of the claim is an act '*jure imperii*', that is, a sovereign or public act. On the other hand, *the sovereign will not enjoy such immunity if the act which forms the basis of the claim is an act 'jure gestionis', that is, an act of a private law character such as a private citizen might have entered into; particularly where fundamental rights are concerned. ... An employment contract being a matter of private law, the court finds that this matter is justiciable under the restrictive immunity doctrine*. (emphasis added)

[61] In the context of our fundamental liberties provisions in our Federal Constitution the matter assumes greater significance as the enshrined right to life in art. 5 includes the right to livelihood, meaning to be engaged in lawful and gainful employment. See *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261.

[62] The cases from other jurisdictions seem to suggest that an employment dispute falls under the purview of private law. Learned counsel for the workman referred to the UK Supreme Court case of *Benkharbouche v. Embassy of Republic of Sudan* [2019] AC 777 at p. 783 as follows:

> During the 20th century a restrictive theory developed in respect of the international community's acceptance of the state's descent into the arena of private rights and obligations. It therefore became necessary to distinguish between acts of a foreign state which attracted immunity, such as acts of a sovereign nature, and those which did not, such as commercial or **employment activities**. (emphasis added)

[63] We were also referred to an Austrian case of *The Embassy Interpreter Dismissal Case* [Case No. 04/01/0260-11] where it was observed as follows at p. 488:

> Furthermore, the Administrative Court feels obliged to point out that the contract of employment in this case has to be qualified as a legal relationship under private law and that foreign States could be subject to Austrian jurisdiction ...

[64] Learned counsel for the workman also, in his resourcefulness, drew our attention to the case of *Cudak v. Lithuania* (2010) 42 EHRR 15 at p. 149:

> H12 (i) ... In particular, she had not performed functions closely related to the exercise of governmental authority, she was not a diplomatic agent or consular officer, nor was she a national of the employer state. Lastly the subject matter of the dispute had been linked to the applicant's dismissal [60]
>
> H13. (j) Neither the Lithuanian Supreme Court nor the respondent Government had demonstrated how the applicant's duties as switchboard operator and her secretarial duties could objectively have been related to the sovereign interests of Poland. Whilst the schedule to her contract of employment had stated that the applicant could have been called upon to do other work at the request of the head of the mission, it did not appear that she had ever actually performed any functions related to the exercise of sovereignty by Poland. [70]

[65] The above case is instructive in that designation of one's job alone might not settle the matter and that the State ought to lead evidence as to whether what the workman performed had anything to do with functions related to the exercise of sovereignty of the foreign State.

[66] That can best be done at the avenue provided by the law of the receiving State in the case of a dismissed workman aggrieved by the decision of his employer, a foreign sovereign State here.

[67] Learned counsel for the respondent had alerted this court to an array of cases from other jurisdictions where dismissal under an employment contract was held to be a matter falling within the sovereign and governmental action of the foreign State over which local courts would refrain from assuming jurisdiction based on the doctrine of absolute immunity or even that of restrictive immunity as falling outside its pale and province.

[68] One such case is that of *Sengupta v. Republic of India* [1983] ICCR 221 EAT UK. As highlighted by learned counsel for the workman, that case is an appeal from the Industrial Tribunal that had held that they had no jurisdiction to entertain the claim since it was excluded by the UK State Immunity Act 1978. The employee there was nevertheless heard in the Industrial Tribunal whereas the respondent here had sought to shut the workman out at the Ministerial level without giving him a fair opportunity to be heard as to why he had been dismissed.

[69] What is important in the *Sengupta*'s case was that the court there did not exclude the possibility of other employees of Embassy being able to claim against the Embassy. The court held that the question will have to be decided if and when it arises at p. 229 as follows:

> We do not exclude the possibility that, apart from the Act of 1978, **employees who are solely concerned with providing the physical environment in which the diplomatic mission operates might be able to claim**: that question will have to be decided if and when it arises.
>
> (emphasis added)

[70] We hear the workman saying in his affidavit that his task as a security guard concerned only the physical environment of the diplomatic mission. Whether that is true or otherwise is a matter eminently within the purview and scope of the Industrial Court's jurisdiction, involving as it is a mixed question of fact and law.

[71] Learned counsel for the respondent The USA had relied heavily on the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 ("the 2004 Convention"). However, Malaysia is NOT a signatory to this Convention and the 2004 Convention is not part of our corpus of law until it is incorporated into our domestic law by an Act of Parliament. That is a matter for the Legislature to decide and not for the courts. See the Federal Court cases of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297 and *TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications* [2019] 10 CLJ 436; [2019] 6 MLJ 141.

[72] We understand that where fundamental liberties and human rights are concerned, the courts are more prepared to take a robust approach in incorporating international human rights norms into the domestic law even though a particular convention has not been ratified or incorporated into domestic law by legislation.

[73] Our courts tend to be more flexible if the Convention to which we are not a party yet nevertheless promotes principle of fundamental liberties enshrined in our Federal Constitution and the Rule of Law or that it is embodied in the United Nation Universal Declaration of Human Rights ("UDHR") which values are not inconsistent with our Federal Constitution.

[74] Further support for this approach can be found in the article by Justice Michael Kirby who when as the President of the Court of Appeal of New South Wales (as he then was), wrote in '*The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes*' (1993) 16 UNSWLJ 363 at p. 366, to explain regarding what has now come to be popularly referred to as the 'Bangalore Principles on the Domestic Application of International Human Rights Norms':

> But the truly important principles enunciated at Bangalore asserted that fundamental human rights were inherent in human kind and that they provide "important guidance" in cases concerning basic rights and freedoms from which judges and lawyers could draw for jurisprudence of practical relevance and value.
>
> The Bangalore Principles acknowledged that in most countries of the common law such international rules are not directly enforceable unless expressly incorporated into domestic law by legislation. But they went on to make these important statements:
>
> > *There is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law – is uncertain or incomplete*;
> >
> > It is within the proper nature of the judicial process and well-established judicial functions for **national courts to have regard to international obligations which a country undertakes** – whether or not they been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. (emphasis added)

[75] The precursor that led to the awakening of this robust approach can be traced to the case of *Chung Chi Cheung v. The King* [1939] AC 160 at p. 168 where Lord Atkin speaking for the Privy Council said quite prophetically:

> ... It must be always remembered that so far at any rate as the courts of this country are concerned international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There

A is no external power that imposes its rules upon our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their B tribunals.

[76] For instance, in the Human Rights Commission of Malaysia Act 1999, it is expressly provided in s. 4(4) as follows:

For the purpose of this Act, regard shall be had to the Universal C Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.

[77] Article 23 of the UDHR espouses the high ideals of the right to work and protection against unemployment as follows:

1. Everyone has the right to work, to free choice of employment, to just D and favourable conditions of work and to protection against unemployment.

[78] Embedded in that protection is the enshrined right to be heard before dismissal and if that right is not accorded to him when a workman was sacked, he must certainly be given that right in the tribunal set up to hear E his unlawful dismissal case and in our jurisdiction, it is the Industrial Court that the Minister had seen it fit to refer the unresolved dispute to.

[79] The workman said, he was not given a right to be heard before his dismissal and we cannot see how according him this right at the Industrial Court would compromise the principle of immunity of sovereign and F governmental actions in the receiving State.

[80] We must give a human face to the law and international law is no different and if we may say, the difference if any lies in its espousal of universal human values of equality before the law and equal protection of the G law as well as the right to be heard no matter how puny one may be in the eyes of the other.

[81] Article 2 of the UNDHR declares in the lofty language of hope for all humanity as follows:

Everyone is entitled to all the rights and freedoms set forth in this H Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, **no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs**, whether it be independent, trust, non-self-governing or under any other limitation of I sovereignty.

(emphasis added)

[82] We are not for a moment saying that a workman cannot be properly dismissed. What we are saying is that it has to be done in accordance with the law and the procedure prescribed by the law and in this case, the law of land of the receiving State. To be abruptly sacked from one's job is one of the most traumatic experiences of life and perhaps the workman might well have deserved it from what is said to be his serial misconduct but the process of adducing evidence to show that and he being given an opportunity to be heard cannot be casually ignored.

[83] Our zeal in incorporating the terms of a convention into our own domestic law must be tampered with cautious circumspection involving mutuality of treatment of States in the international relation with each other.

[84] The express words of the 2004 Convention where the relevant provision is art. 11 in the context of this employment dispute reads:

Article 11 Contracts of employment

1. *Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State*.

2. Paragraph 1 does not apply if:

   (a) the employee has been recruited to perform particular functions in *the exercise of governmental authorit***y**;

   (b) the employee is:

      (i) a *diplomatic agent*, as defined in the Vienna Convention on Diplomatic Relations of 1961;

      (ii) a *consular officer*, as defined in the Vienna Convention on Consular Relations of 1963;

      (iii) a *member of the diplomatic staff* of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or

      (iv) *any other person enjoying diplomatic immunity*;

   (c) the subject-matter of the proceeding is the recruitment, renewal of employment or *reinstatement of an individual*;

   (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, *such a proceeding would interfere with the security interests of that State*;

A (e) *the employee is a national of the employer State* at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

(f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

B

(emphasis added)

[85] As can be seen, this very art. 11 itself makes serious inroads into what is the default position as stated in the opening para. 1 of art. 11 which C recognises that unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

D **[86]** The wisdom or otherwise of accepting this 2004 Convention as part of our domestic law is within the province of our Parliament and not the courts and it has not been shown how by not accepting it, the rules and norms of international human rights as we know them would be thrown into jeopardy.

E **[87]** From the list referred to by learned counsel for the appellant workman, only 28 States have signed the 2004 Convention and 22 are parties to it. Even those who have signed the 2004 Convention have made some reservations to it.

F **[88]** Finland for example reserved for itself the following:

> ... that the Convention is without prejudice to any future international legal development concerning the protection of human rights.

[89] In the case of Norway, it is recorded as follows:

G > Finally, Norway understands that the Convention is without prejudice to any future international development in the protection of human rights.

[90] Even going by the stipulations in the 2004 Convention, for it to apply and hence confer exemption from the jurisdiction of the legal process of the receiving State, under para. 2(a) the employee must have been recruited to H perform particular functions **in the exercise of governmental authority**. (emphasis added). Whether that is the case or not would have to be decided by the Industrial Court.

[91] As for para. 2(b)(i), (ii) and (iii) of the 2004 Convention, the workman here is certainly not a diplomatic agent or a consular officer or a member of I the diplomatic staff.

[92] It may be argued that since para. 2(c) provided for the non-applicability of para. 1 of art. 11 if the subject matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual, then the exception to State immunity would not apply here as the workman is claiming for reinstatement.

[93] Whilst it is true that the remedy sought for in the Industrial Court is that of reinstatement, this court would take judicial notice of the fact that reinstatement is hardly granted in a case where to do so would be disruptive to industrial harmony in that the relationship of mutual trust and confidence had been eroded beyond repair and where with such a long passage of time of more than ten years having lapsed, an award of damages *in lieu* of reinstatement would be made should the workman succeed in proving unlawful dismissal.

[94] It was also submitted that the court should not go behind what had been affirmed by the First Secretary who was the counselor for management affairs for the diplomatic mission in Malaysia as para. 2(d) of art. 11 of the 2004 Convention reads:

> (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, **such a proceeding would interfere with the security interests of that State**; (emphasis added)

[95] However, the affidavit in support of the averment that such a proceeding would interfere with the security interests of The USA was affirmed not by the Head of State or the Head of Government or the Ministry of Foreign Affairs for the diplomatic mission in Malaysia but instead by the First Secretary. The averments were made to the effect that the Industrial Court would then have to investigate and audit the internal affairs and management of the respondent, a sovereign State and that this would be interfering with the interests of The USA.

[96] As for the exemption in para. 2(e) of art. 11, that immunity of the State can only be applied if the employee is a national of the employer State. Here the workman is a Malaysian citizen.

[97] Learned counsel for the respondent referred to the caseworker of the *British High Commission v. Jansen* [2015] 3 LRC 565, Supreme Court, Sri Lanka ("*Jansen*"), where it was held that sovereign immunity applied in an unlawful dismissal suit filed against the British High Commission by its former security assistant who had been dismissed after he was found sleeping while on duty. This was because, the former employee's duties were not only to provide security but also to maintain the inviolability of the Embassy's premises which could not be classified as merely auxiliary but were integral to the core sphere of sovereign activity.

[98] However, it must be noted that the matter had come to the Sri Lanka Supreme Court after a finding of fact by the Labour Tribunal and a further appeal to the High Court. The appellant had pleaded immunity from the jurisdiction and took no part in the proceedings. Whilst the Tribunal considered that the application could not proceed, the High Court nevertheless held that the express reference to local labour laws in the letters of appointment amounted to waiver of immunity.

[99] Similarly in the instant case, the issue of no jurisdiction should be taken up as a preliminary issue before the Industrial Court. The Sri Lanka Supreme Court had this to say on the plea of sovereign immunity at pp. 527-528 as follows:

> **Immunity by reason of the sovereign independent status of a state is only available when proceedings are initiated against a foreign state and is a preliminary plea taken at the commencement of the proceedings**. It serves a very important purpose. It debars the court of the state where proceedings are brought (the forum court or national court) from exercising jurisdiction to inquire further into the claim, so a plea of immunity is a technique of avoidance of jurisdiction of a court of one state and such a denial of jurisdiction is said to arise out of international comity. (emphasis added)

[100] Learned counsel for the respondent also referred to a Norwegian case called *Sostrand v. United States of America*, Case No. 14-111748 TVI-OTIR/05 (Oslo District Court, 2015), a decision which was subsequently affirmed by the Norwegian Court of Appeal and Supreme Court.

[101] It was held that the United States was immune from an unlawful dismissal claim made by a former security guard at the United States Embassy in Norway. Upon considering the former employee's duties which included the observation of objects to uncover potential security risks to the embassy, the court found that the said duties included functions connected with the Embassy's security which must be deemed to be of major significance for the sending State. The former employee was hired to perform these duties as an element in the embassy's exercise of governmental authority.

[102] However, the decision was arrived at with reference to the 2004 Convention art. 11 No. 2(a) and this case cannot be of persuasive authority for the reason that the 2004 Convention is not part of our domestic law.

[103] Learned counsel for the respondent referred to a decision of the UK Employment Tribunal in *Mr N Buttet v. Ambassade de France Au Royaume Uni* Case Number: 2204921/2012 (The Employment Tribunal at London Central, 2019) where the claimant, a French national, had claimed for certain holiday pay said to be due to him at the French Ambassador's residence in UK.

[104] It is pertinent to note that the Employment Tribunal decided on the preliminary issue of State immunity asserted by France as follows:

> 1. This was listed as a hearing to determine not just the jurisdictional issue of state immunity but also depending on the outcome of that issue, the full merits issue of the claimant's holiday pay. Both sides were in agreement that only the jurisdictional issue should be dealt with at this hearing and I agreed with that approach. This was therefore a preliminary hearing on the issue of state immunity.
>
> 2. The respondent only participates in these proceedings for the purpose of claiming state immunity. It does not otherwise submit to the jurisdiction

[105] The Employment Tribunal also decided the preliminary issue under the 2004 Convention of which the United Kingdom is a signatory.

[106] As we understand from learned counsel for the claimant, he had no issue with the question of State immunity being tried first in the Industrial Court and that is a further ground why we should not sidestep the Industrial Court and decide on this matter of assertion of State immunity based on a judicial review application.

[107] The question with respect to the exact nature of his role as a security guard can only be determined at the fact-finding stage at the Industrial Court. That was the exercise that the employment judge went through as can be seen in the observation below:

> 119. Following *Benkharbouche*, there is a restrictive doctrine whereby immunity is limited to acts by a state in the exercise of sovereign authority and not acts of a private law nature. The claimants in *Benkharbouche* were engaged in duties such as housekeeping, cooking and cleaning and the Supreme Court was clear that there was nothing inherently governmental about this. The claimant said it required a closer nexus to the Ambassador or State's functions and considered that a bodyguard might come closer to this.
>
> 120. I find that providing security and protection to the inviolable and unique character of mission premises is not a purely domestic function. The question of security of such premises **may involve dealing with confidential security information particular to that state**. It is not the same as providing security services for any private company, such as in the example given of a supermarket.
>
> 121. **My finding is that there is enough for the respondent to show that the claimant was performing state functions** and therefore a sovereign act in the guarding of the mission premises. (emphasis added)

[108] In the instant case, the workman had stated in his affidavit that his job is of a menial character and that he did not handle any confidential information or documents. Whether or not that is true would have to be tested in the Industrial Court.

[109] Learned counsel for the respondent also drew this court's attention to the case of *The Government of Canada v. The Employment Appeals Tribunal and Burke* 95 ILR 467. The case involved an Irish citizen who was employed by Canada as a chauffeur with the Canadian Embassy in Dublin. He was dismissed and he brought a claim against Canada before the Employment Appeals Tribunal under the Unfair Dismissals Act 1977. Canada objected on the ground that the Tribunal did not have jurisdiction to hear the claim. The Tribunal rejected the argument and proceeded with the claim and awarded compensation. Canada then proceeded with a judicial review application in the High Court for a writ of *certiorari*. Though Canada failed at the High Court, it succeeded at the Supreme Court. The Supreme Court on 12 March 1992 held that the doctrine of restrictive immunity was applicable. It was further held that as a result of the trust and confidentiality required, a bond was created between the chauffeur and his employers which involved the employer in governmental activity. Thus, Canada was protected from the suit by the doctrine of State immunity.

[110] Again, we cannot fail to note that the matter had come before the High Court by way of a judicial review application after the Employment Appeals Tribunal had decided the matter. There was no short-circuiting of the process which is unlike the instant case where instead of allowing the Industrial Court to decide on the issue of sovereign immunity based on the restrictive immunity doctrine, The USA had challenged by way of a judicial review application the decision of the Minister to refer the matter to the Industrial Court.

[111] That, if we may say, is rather premature at this stage. It is different if the Industrial Court had decided against The USA and the matter is then brought to the High Court by a judicial review application and then to the Court of Appeal upon an appeal from the High Court's decision.

[112] Learned counsel for the respondent The USA also referred to the case of *Stefanov v. United States of America*, Civil Case 24509/2010 (Sofia District Court, Second Civil Division, 2014), the former employee was a security guard at the United States Embassy in Bulgaria. His obligations, which the court found to be related to the security of the diplomatic mission, included the guarding of buildings, property and people and patrolling and responding in cases of emergencies. The court held that the United States was immune from the court's jurisdiction in respect of the dismissal claim because national security, which also involves the security of the diplomatic mission, represents the exercise of a sovereign right of the State.

[113] Again, it appears to be the decision of the court of first instance there in Bulgaria where the matter was brought and the decision made after a finding of fact on the scope and nature of the security guard's duties.

[114] Learned counsel for The USA had summarised the case of *Van Schoten v. United States of America*, 8 Sa 664/16 (Regional Labour Court Munich, 2017) as one where the former employee was a security investigator at the Regional Security Office of the United States Consulate General in Munich. His duties included the performance of regular personnel safety checks, analyses and creation of security reports about security threats and operational support during regular exercises. The court found that the activities exercised by the former employee must be qualified as sovereign, taking into account his attribution to the Regional Security Office department and the activities exercised by him accordingly which were respectively related to providing for the security of the diplomatic mission. The court held that after all, providing security at State offices in the State's own territories is attributable to the police and/or military branch and it thus falls within the generally recognised sphere of sovereign activity. The United States was therefore immune from the court's jurisdiction in respect of the former employee's dismissal claim.

[115] Again, we note that the claim was brought before the Regional Labour Court in Munich and the Labour Court inquired into the nature and scope of duties of the security investigator employed.

[116] Learned counsel for The USA in his in-depth and thorough research into every conceivable case that might be of assistance to this court, and for that we are truly grateful, referred us to the case of *Anonymous v. United States Government*, Misc Civil Motion 1137/10, Labour Dispute 13806-07-10 (Jerusalem District Labour Court, 2011), where the former employee was a security investigator and coordinator at the United States Consulate General in Jerusalem. His duties included the handling of security for diplomats visiting the West Bank. The court held that the United States was immune from the court's jurisdiction in respect of the former employee's dismissal claim because he was responsible for both the security of the embassy and for other diplomats whose interest and movement in Israel were of concern to the embassy, and that was just one example of the fact that he was an employee who exercised governmental authority.

[117] Again, the Jerusalem District Labour Court assumed jurisdiction and decided on the matter accordingly.

[118] We are more than confident that our Industrial Court would be properly positioned to so decide the matter seeing that our Parliament in its wisdom has statutorily provided for the mechanism of a Minister's referral to the Industrial Court to decide on all issues of fact and law that may impinge on a case of unlawful dismissal of a workman that could not be resolved at the DGIR's level.

[119] We were also referred by learned counsel for The USA to *Alvarez Mitre v. United States, First Collegiate Court of the Seventeenth Circuit* [T.C.C.], Judicial Weekly of the Federation and its *Gazette*, 10th Period, January 2020 (Mex.) the former employee was a security guard at the United States Embassy (Consulate) in Ciudad Juarez, Mexico. Her duties included keeping the safety of the perimeter of the Consulate and the employees working thereat, raising alerts of any suspicious activity and maintaining sensitive information classified as confidential within the Consulate's premises. In finding that the doctrine of sovereign immunity applied in respect of the former employee's claim, the court held *inter alia* that analysing the legality of the termination of the security position of the former employee would be an "intromission in the sovereignty of a foreign State".

[120] Reading the brief notes of the case, we can only say that the court of first instance did proceed to hear the matter whereas in the instant case, the Industrial Court is being prohibited from hearing the matter by the High Court's issuance of a prohibition order.

[121] In fact, all the cases cited by learned counsel for the respondent The USA are those where the matter was adjudicated by the relevant Employment Tribunal or court set up under the jurisdiction of the receiving State or that the foreign sovereign State in wanting to assert its defence of sovereign immunity had then escalated the matter further up the tier of adjudication by applying for a judicial review of the decision of the Tribunal or whatever was their process in either applying for a judicial review or lodging an appeal.

[122] At this stage of judicial review, we do not have to answer the question as to whether the dismissal of the workman as a security guard was a decision of The USA made in its governmental function as a sovereign state and not a private or commercial matter and as such is entitled to sovereign immunity from a reference by the Minister.

[123] We have by broad strokes attempted to express what we understand the law to be and finally the facts have to be determined by the Industrial Court for the proper result to be had by the application of the law.

[124] That is a question that the Industrial Court, under our statutory scheme of a speedy adjudication of an industrial dispute under the IRA, has been reserved by Parliament to decide.

[125] At the end of the day, we are concerned with the far more important question as to whether the Minister's reference to the Industrial Court ought to be set aside at this stage by way of judicial review and the question is further and more fully discussed below.

Whether The Minister's Reference Here In The Circumstances Of This Case Is Tainted With Illegality, Irrationality Or Procedural Impropriety That It Ought To Be Quashed

[126] The Senior Federal Counsel ("SFC") for the Minister submitted that the question of whether The USA as the respondent here enjoys sovereign immunity *vis-a-vis* the workman's job scope and subject to the jurisdiction of the Industrial Court is a serious question of fact and law which must be determined by the Industrial Court.

[127] We agree that at this point of the reference by the Minister, the crux of the dispute is not whether the respondent does or does not enjoy sovereign immunity. The all-important issue for the court to decide, as stressed by the SFC, is whether in making a decision under s. 20(3) of the IRA, the Minister is under a duty to make a determination on the issue of sovereign immunity *vis-a-vis* the job scope of the workman which goes to the question of jurisdiction of the Industrial Court.

[128] We are with the SFC that the Minister had not erred in referring the dispute to the Industrial Court in exercising his discretion under s. 20(3) of the IRA, as the only question to be considered by the Minister is whether the representation raises a serious issue of fact and/or law to be adjudicated by the Industrial Court.

[129] Moreover, the question of whether the respondent The USA enjoys sovereign immunity goes to the question of jurisdiction of the Industrial Court and hence, is a serious question of fact and law which must be determined by the Industrial Court.

[130] The High Court had disagreed with the SFC's submission and instead:

(i) made a finding of fact that the workman's duty as a security guard is integral to the sovereign activity of the State and its embassy. The dismissal of the workman by The USA was in the exercise of its sovereign authority and as such the doctrine of sovereign immunity is applicable. Consequently, the Industrial Court has no jurisdiction to hear the workman's representation (at [31]-[32] GOJ of the High Court).

(ii) held that the Minister committed an error of law in referring the representation to the Industrial Court because the representation is frivolous and vexatious and involves no serious question of facts or law to be tried (at [33] GOJ of the High Court).

(iii) held that the question is plain and clear relating to the jurisdiction of the Industrial Court on the principle of sovereign immunity. It is not a fit case to refer to the Industrial Court for adjudication. The issue of sovereign jurisdiction can be resolved at the Minister's level as wide discretionary power has been given to the Minister pursuant to s. 20(3) of the IRA (at [34] GOJ of the High Court).

[131] Before us, the learned SFC argued that the High Court has erred in the following respect which warrants appellate intervention:

(i) that high authorities from the Federal Court and the Court of Appeal had decided that question of jurisdiction of Industrial Court is for the Industrial Court to decide and not by the Minister under s. 20(3);

(ii) that the workman's representation which involves issue of sovereign immunity *vis-a-vis* the designation of the workman that goes to the jurisdiction of the Industrial Court is a serious issue of fact and law to be adjudicated upon by the Industrial Court;

[132] At the risk of stating the obvious, the IRA is a beneficial piece of social legislation by which Parliament recognised the status of a workman, often at the losing end where contractual notice of termination without the need to assign any reason is concerned or in a case where no opportunity to be heard is given to the workman who was told that he had been dismissed.

[133] The long title to the IRA attests to that as follows:

> An Act to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

[134] Consistent with that approach, it is further provided for in s. 30(5) of the IRA as follows:

> The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[135] To safeguard and promote the rights of the workman, Parliament had put in place a three-tier machinery which a dismissed employee may invoke when he had been dismissed without just cause and excuse as follows:

(i) conciliatory power vested in the DGIR;

(ii) referral power vested in the Minister; and

(iii) adjudicatory power vested in the Industrial Court.

[136] The DGIR and the Minister have no adjudicatory function for that is reserved for the Industrial Court as the port of first call if the dispute on a workman's dismissal cannot be resolved at the DGIR's level and is then escalated to the Minister's level who based on disclosed criteria, is to exercise his discretion to refer it to the Industrial Court for adjudication. See *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481 at pp. 509-510.

[137] The discretion of the Minister housed in s. 20(3) of the IRA reads as follows:

> Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

[138] All discretion reposed on the Executive must be exercised in accordance with the law and in this case, in accord with the intention of the statute. See the Supreme Court case of *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9.

[139] Case law has clarified how this discretion of the Minister is to be exercised. The two questions, as submitted by the learned SFC, that the Minister ought to ask himself are:

(i) Whether his decision will have the effect of preventing or settling the particular dispute, in accordance with the purpose of the IRA.

See: *Hong Leong Equipment Sdn Bhd* (*supra*) at pp. 513E- F and the Court of Appeal case of *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305 at pp. 310-311.

(ii) Whether the representation made under s. 20(1) is frivolous or vexatious, in which case it ought not be referred to the Industrial Court.

[140] Conversely, if the representation raises serious questions of fact or law calling for adjudication, it ought to be referred to the Industrial Court since it is the only proper forum to adjudge such questions of fact or law. See the Federal Court case of *The Minister For Human Resources v. Thong Chin Yoong & Another Appeal* [2001] 4 MLJ 189 at 231C-E.

[141] The limited role of the Minister is captured and clarified in the *dicta* of the Court of Appeal in *Hong Leong Equipment Sdn Bhd* (*supra*) as follows at p. 715 (CLJ); p. 519 F-H (MLJ):

> ... the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s 20(1) of the Act, and that it is therefore **no part of his function to arrive at a concluded view upon the merits of the dispute**. His role is **limited to ascertaining whether, on the facts and material placed before him, the representations raise serious questions of fact or of law calling for adjudication**. (emphasis added)

[142] A discretion that is to be exercised according to law is in effect a legal obligation to refer a representation to the Industrial Court under s. 20(3) of the IRA as long as he considers that there is a serious issue of fact or law which requires determination. We agree with the learned SFC that provided that the representation relates to the allegation of dismissal without just cause

A or excuse and that the serious issue of fact and law has relevance to the dispute, the Minister is under a duty to refer the matter to the Industrial Court for resolution. See the Federal Court case of *Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors* [2007] 2 CLJ 97; [2007] 3 MLJ 1 at para [8].

B **[143]** When the Minister makes a reference under s. 20(3) of the IRA, the Industrial Court assumes the threshold jurisdiction to enter upon the inquiry, or jurisdiction in the narrow sense. The Industrial Court cannot on its own accord proactively open a file and adjudicate upon a complaint of a dismissed employee other than through the route of the Minister's reference.

C **[144]** As explained by the Supreme Court in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777; [1997] 2 MLJ 685 at p. 692, once it is seized with threshold jurisdiction, the Industrial Court is empowered, unlike the DGIR and the Minister, to determine whether it has the wider jurisdiction to entertain the workman's claim.

D **[145]** For instance, the Industrial Court has the power to determine such jurisdictional issues as to whether a claimant is a "workman" falling within the ambit of the IRA and if we may add in the context of the instant case, whether State immunity applies such that under international law, the Industrial Court has no jurisdiction. See also the Supreme Court case of E *Enesty Sdn Bhd v. Transport Workers Union & Anor* [1985] 1 LNS 148; [1986] 1 MLJ 18 at pp. 21-22.

[146] This wider "jurisdiction to decide whether there is jurisdiction" was explained in the leading case of *R v. Fulham, Hammersmith and Kensington* F *Rent T ribunal, ex p Zerek* [1951] 2 KB 1 at 10-11:

> When, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to their jurisdiction, the tribunal have to make up their minds whether they will act or not, and for that purpose to arrive at some decision on whether they have jurisdiction or not. *If their jurisdiction depends upon the existence of a state of facts, they must inform themselves about them, and* G *if the facts are in dispute reach some conclusion on the merits of the dispute* ... I am unable to see why the tribunal should, in making their preliminary inquiry, be restricted to any particular class of case, or how they can be restrained from investigating for their own purposes any point which they think it necessary to determine so that they can decide upon their course of H action.
>
> (emphasis added)

[147] Once the narrow threshold initial jurisdiction of the Industrial Court is triggered by the Minister's reference, the Industrial Court is then competent to inquire into whether it has the wider jurisdiction under the I statute and the law based on a finding of the relevant facts and the law. Common issues would be whether the dismissed employee is a "workman"

within the meaning of the Act or as in this instance whether under international law State immunity can be raised as a valid defence to exclude jurisdiction of the Industrial Court.

[148] Without making this distinction between the initial narrow threshold jurisdiction as opposed to an inquiry into a wider thorough jurisdiction of the Industrial Court, we would get tied in convoluted knots of nomenclatures and niceties with confusingly conflicting and or even conflating concepts.

[149] Thus the Minister in making his reference assumes that the claimant is a workman, since that question can only be determined after due inquiry by the Industrial Court in the circumstances of the case. Likewise, the Minister makes no decision as to whether the nature of the workman's job and his dismissal is that bearing the imprimatur of the State such that State immunity may be validly invoked.

[150] He is not in a position to ask for further evidence on top of the representations before him which would often reflect conflicting stance between the workman and the foreign State employer. There is no provision for him to conduct his own inquiry and he is certainly handicapped in doing so. If he is of the view that the complaint on the dismissal is not altogether frivolous and fanciful and that the dispute could not be amicably resolved, he would exercise his discretion and refer the dispute to the Industrial Court.

[151] Parliament, now with the experience of hindsight has made the job easier for the Minister in that upon the DGIR's failure to resolve the dispute at the conciliation level, the DGIR shall refer the dispute to the Industrial Court, bypassing the need to refer to the Minister.

[152] If this dispute had happened after the Industrial Relations (Amendment) Act 2020 (Act A1615) had come into force, are we saying that the DGIR must inquire into the applicability of the defence of State immunity, as the DGIR is not legally trained nor in a position to make any determination save to conciliate the parties if he could? see *Assunta Hospital v. Dr A Dutt* [1980] 1 LNS 121; [1981] 1 MLJ 115 where the Federal Court dismissed the employer's application for a prohibition to prevent the Industrial Court from adjudicating the matter on ground that Dr Dutt was not a workman. The Federal Court observed at p. 116 (MLJ) as follows:

> The question whether Dr Dutt was a workman within the definition in the Act so as to avail himself of the provisions thereof, in our view and with respect, is a mixed question of fact and law and clearly within the province of the Chairman to find in a reference to him of the workman's representations of dismissal without just cause or excuse.

[153] See *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304 where the Federal Court allowed the appeal of Dr Dutt against the order of *certiorari* granted by the High Court to quash the Industrial Court award and the Federal Court restored the Industrial Court award.

[154] Another example given by the Federal Court in *Kathiravelu Ganesan* (*supra*) is the jurisdictional question of whether a claim for reinstatement under s. 20(1) of the IRA is made within the time limit and that involves mixed questions of law and fact for the Industrial Court, the fact being the ascertainment of the relevant conduct of the parties in pursuing their claim and the inferences proper to be drawn therefrom. Once that is ascertained, it is a question of law whether or not there was sufficient evidence that the claim was made in time. If the claim is not made within time, the Industrial Court has no jurisdiction to consider the claim. See the Federal Court case of *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] 1 MLJ 238 at p. 240C.

[155] The court's role in reviewing the Minister's decision is to examine, whether on the facts and circumstances before the Minister, the representation gives rise to a serious issue of fact or law which necessitates reference to the Industrial Court. See the Federal Court case of *Exxon Chemical (M) Sdn Bhd* (*supra*) at [9]-[10].

[156] The Court of Appeal in *Menteri Sumber Manusia v. John Hancock Life Insurance (Malaysia) Bhd & Another Appeal* [2007] 1 CLJ 366; [2007] 2 MLJ 546 also had occasion to discuss a similar issue. In that case, the respondent company applied for judicial review of the Minister's decision to refer the dispute under s. 20(3) of the IRA, and sought to prohibit the Industrial Court from hearing the reference. The respondent contended that the claimant was not a "workman" and his removal as a director of a company did not amount to a "dismissal". As such, it was argued that the Minister acted without jurisdiction in referring the dispute to the Industrial Court, and that the Industrial Court had no jurisdiction to adjudicate upon it. It was also contended, in reliance upon *Kathiravelu Ganesan*, that any challenge to the threshold jurisdiction of the Industrial Court must be made by way of challenge to the Minister's decision to refer.

[157] These arguments were rejected by the Court of Appeal. The Court of Appeal held that the issue of whether the claimant is a workman, being a question of mixed fact and law, is solely for the Industrial Court to decide at para [35] as follows:

> There are serious and fundamental disputes of fact and questions of law that arise from the claimant's representations and these are matters which have to be dealt with by the Industrial Court. The facts placed before the Minister were adequate for him to refer the claimant's representations to the Industrial Court. It is the Industrial Court which will have to decide whether the claimant is a workman as defined under the Act. Once the Industrial Court determine the claimant was a workman, it has the jurisdiction.

[158] Learned counsel for the respondent submitted that the Minister has, with all due respect, a flawed apprehension of the law with regard to taking up a threshold jurisdictional challenge as set out by the Supreme Court in *Kathiravelu Ganesan* (*supra*), where the apex court held that the party who contends that the Industrial Court does not have jurisdiction to enter upon an inquiry has an election to decide on one of the two steps below, namely:

(i) The said party must challenge the Minister's reference by way of an application for judicial review to quash the reference and seek for an order of prohibition against the Industrial Court to adjudicate upon the matter; or

(ii) Where such a challenge is not thus taken, the Industrial Court must be permitted to decide on the dispute to conclusion, and in the process deal with the jurisdictional question.

[159] The Supreme Court then was dealing with the example of cases where the Minister's reference was made exceeding the time prescribed for reference which at that time was 30 days from the date of dismissal of the workman. Two other examples were given with respect to whether the contract in that case was one that was "extra-territorial" in that it was performed in Singapore and the taxes and central provident fund contributions were made in Singapore.

[160] The other example given was the issue as to whether the dismissed employee was a workman before the Industrial Court could have jurisdiction. The Supreme Court was not having in mind a case where the sovereign immunity of a State which was an employer was being raised to exclude jurisdiction.

[161] Whilst there appears to be nothing wrong in bringing the challenge by way of a judicial review, where the issue itself involved a mixed question of law and fact, the High Court in hearing the matter may still refuse to quash the reference or may dismiss the prayer for a prohibition against the Industrial Court hearing the reference but rather allow the Industrial Court to determine the matter by way of a preliminary issue.

[162] Against that decision on a preliminary issue, the employer may apply to the High Court for a prohibition order against the Industrial Court proceeding to hear the matter on its merits. Whilst the High Court granted the prohibition, the Supreme Court held that the Industrial Court had jurisdiction as the employer was within jurisdiction and that the workman was engaged within jurisdiction. The fact that the workman was required to perform his contract of employment in another company in a foreign country and was required to pay taxes and make contributions to the compulsory central provident fund in Singapore could not make the dispute extra-

territorial in nature and that the power to dismiss the workman rested at all times with the respondent company which was well within the territorial jurisdiction of the Industrial Court.

[163] It is to be noted that the Supreme Court set aside the order of the High Court and remitted the case back to the Industrial Court for it to be heard on its merits. We must also not lose sight of the fact that the Industrial Court did decide on the preliminary issue as it was a mixed question of law and fact before being prevented to do so by the grant of a prohibition order by the High Court pursuant to a judicial review application. It was not a case where the High Court and then the Supreme Court, by way of an appeal to it, had heard by way of a judicial review the reference by the Minister.

[164] In the instant case, the Industrial Court had not even commenced any hearing yet let alone made any decision on the preliminary issue and it may well decide in favour of The USA based on the evidence that may be adduced before it.

[165] It would then be for the workman to bring a judicial review application if he is aggrieved by the decision of the Industrial Court. Likewise, if the decision is against The USA, it may apply by way of judicial review to quash the decision based on the finding of a mixed question of fact and law of the Industrial Court and to prohibit the Industrial Court from proceeding to hear the matter on its merits. See the case of *Thong Chin Yoong* (*supra*) at 231C-E).

[166] The rationale expressed by the Supreme Court In *Kathiravelu Ganesan* (*supra*) as to why the Industrial Court "must be permitted to decide the dispute to conclusion and in the process deal with the jurisdictional question" was that not to do so would obstruct the speedy disposal of a trade dispute and thereby defeat the spirit and intendment of the Act. That is understandable and a concern properly expressed especially in the light of s. 30(3) of the IRA which provides as follows:

> The Court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under subsection 20(3).

[167] The two examples forefront in the mind of the Supreme Court were whether the particular claimant is or is not a workman and whether the matter involves the exercise of extra-territorial jurisdiction.

[168] Nowhere was it stated that in a case where the preliminary issue raised like for example whether the work of the workman comes within the exemption of restrictive immunity in that it is within the sovereign immunity of the State and not that of a private commercial act, the parties cannot agree or that the Industrial Court cannot as a matter of prudence, decide that issue as a preliminary issue.

[169] The answer is clearly that the Industrial Court, as is the case with Employment Tribunals in other jurisdictions, has the duty to embark on a fact-finding to determine if the defence of State immunity applied to exclude the jurisdiction of the court or Tribunal.

[170] Indeed as pointed out by the learned SFC, the respondent in their own O. 53 statement acknowledged that the question of sovereign immunity involves factual issues, requiring among others an inquiry into the function of the workman's position in The USA embassy to determine whether the dismissal fell within the sphere of governmental or sovereign activity.

[171] It would be premature and putting the cart before the horse for a party to seek an order to prohibit the Industrial Court from hearing the reference before it makes a determination on the jurisdictional question. If a party is aggrieved, the proper recourse is to apply for judicial review against the Industrial Court after the Industrial Court has made a determination on that question.

[172] In this case, what the respondent The USA has invited the High Court to do is in effect to take over the function of a specialised statutory tribunal, and to determine the serious question of fact and law at first instance to the exclusion of the Industrial Court. Such an approach runs contrary to the scheme of the IRA and the basic principles of judicial review.

[173] At the Industrial Court, its Chairman has the power under s. 29(g) of the IRA to "generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it" including deciding on a preliminary issue as to whether State immunity would apply based on the nature and duties of the claimant's employment as a security guard.

[174] In the event that the respondent The USA is apprehensive that some confidential matters of State security may be disclosed to the public, it can always ask the Industrial Court to invoke the procedure to be applied to safeguard such secrecy of highly sensitive State matters as provided for in s. 55 of the IRA as follows:

> Secrecy
>
> 55. (1) The Court may in any proceedings direct:
>
> (a) that **any information, book, paper, document or thing tendered in evidence shall not be disclosed or published in any newspaper or otherwise**; and
>
> (b) that any **such evidence shall be taken in private** and that no person who is not expressly permitted by the Court to be present shall be present during the taking of that evidence.

A (2) Any person who discloses or publishes any information, book, paper, document or thing in contravention of this section shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand ringgit or to both. (emphasis added)

B **[175]** The learned SFC highlighted that under s. 30(1) of the IRA, the Industrial Court has **a broad power to make any award or even an interim award in relation to "any or all issues" for it reads**:

(1) The Court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under s. 20(3), to make an award C (including an interim award) relating to all or any of the issues. (emphasis added)

[176] Not to do so would require the State to submit to jurisdiction which it does not want to begin with and so it is perfectly entitled then and not earlier, for that would be premature, to apply for judicial review of the D decision of the Industrial Court that it has jurisdiction. The reason may be that as the work of the dismissed employee does not bear the imprimatur of the sovereign act of a State or within the meaning of governmental duties but that it falls within the private and commercial interest of the State.

[177] Likewise, if the Industrial Court should decide as a preliminary issue E that it does not have jurisdiction for both the nature of the workman's employment as a security guard and the work that he physically carried out as well as the act of dismissal fell within the sovereign act of the State, then the workman might want to proceed with a judicial review application to quash that decision on jurisdiction.

F **[178]** It is no different from a road accident case in the subordinate court where even when the issue of liability is found for the plaintiff at the end of the trial, the court would still proceed to assess damages based on 100% liability of the plaintiff such that should the appellate court disagree on quantum, the decision is already there for the necessary adjustments to be G made accordingly based on the appellate court's apportionment of liability.

[179] Either way, it does not prevent the Industrial Court from proceeding to conclusion the hearing of the case on merits of the dismissal after deciding on the preliminary issue one way or another so as to save time and resources. Should the High Court or whichever is the apex court decide that it has or H does not have jurisdiction, the consequences would follow as day would follow night.

[180] When the Minister's reference is brought under scrutiny of the judicial review searchlight of illegality, irrationality and procedural impropriety, can I the Minister be faulted at that preliminary stage when he could not resolve the issue, to refer to the Industrial Court for a resolution of it one way or the other?

[181] The test is as expounded in the Federal Court's decision of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, where Edgar Joseph Jr FCJ explained on the grounds of judicial review as follows with respect to "illegality" and "irrationality" at p. 173 (CLJ); p. 187 (MLJ):

> Lord Diplock's first ground for challenge, namely, 'illegality', involves insisting that the authority or body whose decision is being impugned has kept **strictly within the perimeters of their powers**. ... (emphasis added)

[182] As for "irrationality", the court observed at p. 173 (CLJ); p. 188 (MLJ) that:

> Lord Diplock's second ground for challenge, namely, 'irrationality' recognises a different route whereby the substance of a decision may be reviewed by the courts. ... In the words of Lord Diplock, 'a decision which is **so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'**. (emphasis added)

[183] All that the Minister had done by the reference, appreciating that he is not in a position to determine even that issue in the overall context of a claim for dismissal without just cause and excuse, is to let the Industrial Court decide and the Industrial Court Judges are all legally trained and having practical experience in the law and certainly as qualified as our judges in the subordinate courts if not in the High Court who are competent enough to decide on the issue of whether absolute or restrictive sovereign immunity applies to the act of dismissal of the workman. The reference by the Minister under s. 20(3) of the IRA does not determine the question of immunity one way or another; it merely confers a threshold jurisdiction upon the Industrial Court to look into the representation and the serious issues it involves. The appropriate and only forum to determine the issue of immunity is the Industrial Court as a matter of first instance upon a reference by the Minister.

[184] The Minister has no axe to grind nor bone to pick with anyone in the reference and certainly not with The USA. As no right to be heard was accorded to the workman, it is only fair and right that he be given this right in the Industrial Court and the respondent could still raise as a preliminary issue the defence of absolute sovereign immunity to be heard first.

[185] As it is the cases from other jurisdictions that have been surveyed above are not so clear-cut and whether or not a claimant employed as a security guard by a foreign State in its embassy premises is performing a duty coming within the governmental and sovereign act of the State is a matter of mixed fact and law to be decided at the first instance by a fact-finding *quasi*-judicial body as may be prescribed by Parliament subject to judicial review in the event a party before it is aggrieved by the decision.

[186] Learned SFC appearing for the Minister referred to a 2016 High Court decision by Justice Asmabi Mohamad J (later JCA) in *Chu Siew Mei @ Karen v. Ketua Pengarah Perhubungan Perusahaan* (Kuala Lumpur High Court Judicial Review No. 25-71-03-2014) that foreign missions do not enjoy immunity in employment matters. Her Ladyship Asmabi Mohamad J (later JCA) granted an order of *certiorari* to quash the decision of the DGIR in refusing to convene a conciliation meeting between the workman and the Australian High Commission and a *mandamus* to compel the DGIR to proceed with convening the conciliation meeting under s. 20(2) of the IRA.

[187] Learned counsel for The USA had preferred to rely on the decision of our High Court in *The Embassy Of Libya v. Menteri Sumber Manusia Malaysia & Ors* [2019] 1 LNS 752; [2019] MLJU 444 in a case where the service of a secretary of student affairs at the Embassy of Libya in Malaysia working on a yearly contract was not renewed after 31 March 2018 and the High Court had allowed a judicial review of the Minister's referral decision with no order as to costs. On appeal, the Court of Appeal upheld the decision though no written grounds of its decision were made available.

[188] We agree with the learned SFC that it is evidently a serious issue of fact and law to be adjudicated by the Industrial Court and perhaps the matter will proceed from there to the High Court by way of a judicial review application and in all likelihood the matter may end up in the Federal Court.

[189] Imagine a scenario in which the Minister had decided upon receiving the report from the DGIR that the defence of State immunity applies and refused to make the reference to the Industrial Court. The workman would in all probability apply by way of judicial review of the refusal of the Minister not to make the reference.

[190] When the matter comes to the High Court on this narrow issue of the Minister's refusal to make the reference, the High Court is "obliged to resist any temptation to convert [its] jurisdiction to review into a reconsideration of the merits as if on appeal". See the case of *National Union Of Hotel, Bar And Restaurant Workers v. Minister Of Labour And Manpower* [1980] 1 LNS 50; [1980] 2 MLJ 189.

[191] This brings to mind the observation of the Federal Court in *Thong Chin Yoong*'s case (*supra*) at pp. 940-941 (CLJ); pp. 230-231 as follows:

> The Minister did not give any reasons for declining to exercise his discretion under s. 20(3) of the Act for which he was entitled to (see *Minister of Labour, Malaysia v. Chan Meng Yuen & Anor* [1992] 2 MLJ 337). However, according to the Minister, he relied on the information provided by the director general pursuant to s. 20(2) of the Act after a settlement could not be reached. One of the materials that the Minister must have considered in determining whether the claimant was dismissed without just cause or excuse or as the claimant put it, he was constructively dismissed, would be on the suspension issue. In other

words, what is the effect of the contract of employment of the claimant with the company, wherein there is no express term for the company to suspend the claimant indefinitely for investigations, even though there was no loss of emoluments, perks etc. It may well lead to the issue of whether there has been a breach of the contract of employment by the company and thereby entitling the claimant to treat the repudiatory act of the company as affecting the foundation of the contract, and therefore consider himself as constructively dismissed (*Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 95).

The High Court and the Court of Appeal did not consider the issue of suspension except to say that it may be relevant for the purpose of determining whether the claimant was entitled to declare that he was constructively dismissed. This issue involved mixed questions of law and fact for the Industrial Court (*Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238). *Further, the question as framed seems to indicate that it is a point of law, in which case then, the proper forum to consider would be the Industrial Court and eventually, if need be, the various level of the courts in our judicial system. Hence, the Minister erred in the exercise of his discretion under s. 20(3) of the Act as held by the High Court and upheld by the Court of Appeal. It is best that we say no more on this issue.* (emphasis added)

[192] There is no good ground to impute any bad faith on the part of the Minister. It would be expecting too much from the Minister for him to decide on the vexed question as to whether one employed as a security guard by a foreign State to work in its embassy's premises in Malaysia would, by its very label, attract the exemption from the application of the doctrine of restrictive State immunity and hence, be entitled to the complete defence of sovereign immunity such that the local courts of the receiving State would have no jurisdiction over it. The Minister is not legally qualified to decide on such a matter though in this case the Minister at the material time was an active member of the Bar before his appointment as a Minister.

[193] It is a matter that can and should be properly investigated by the Industrial Court as a preliminary issue and that the party aggrieved may take up the matter further by way of a judicial review application.

[194] At this juncture, it is no part of the function of the High Court to jump the gun and determine the question of immunity for itself. The High Court is "obliged to resist any temptation to convert [its] jurisdiction to review into a reconsideration of the merits as if on appeal" (*National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower* [1980] 1 LNS 50; [1980] 2 MLJ 189).

[195] In this case, what The USA has invited the High Court to do goes further: in effect, to take over the function of a specialised statutory tribunal, and determine the serious question of fact and law at first instance to the exclusion of the Industrial Court. Such an approach runs contrary to the scheme of the IRA and the basic principles of judicial review.

[196] The test as applied by the Supreme Court in *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9 still holds good where at p. 197 (CLJ); p. 10 (MLJ) Hashim Yeop A Sani CJ (Malaya) said:

> There is no question that the power of the Minister under s. 20(3) of the Act is wide and the language used by the legislature would seem to confer on the minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case provided of course *he has acted bona fide, that is without an improper motive, and he has not taken into account extraneous or irrelevant matters. He has an unfettered discretion but should not be exercised so as to frustrate the object of the statute itself.*
>
> (emphasis added)

[197] We find this approach both sensible and sound and indeed time- saving for as it is, the matter even before it could start in the Industrial Court, had been brought to the High Court and then to the Court of Appeal and now to the Federal Court to seek leave to appeal to. The referral of the Minister cannot be said to be tainted with illegality, irrationality or procedural impropriety.

Pronouncement

[198] We find merits in the two appeals before us. The issue as to whether the dismissal of the workman as a security guard involves the question of the exercise of a sovereign act that attracts restrictive immunity or otherwise would depend on findings of fact with respect to the nature of his job. That exercise is best undertaken by the Industrial Court.

[199] We are therefore satisfied that the learned High Court Judge had erred in his decision to allow the judicial review application and to quash the Minister's decision to refer the dispute to the Industrial Court.

[200] Accordingly, both the appeals are allowed and the decision of the High Court is set aside with the result that the Industrial Court could now proceed to hear the dispute. With the setting aside of the High Court's order, the order of costs of RM6,000 each to be paid by the workman and the Minister are also set aside.

[201] Learned counsel for the appellant workman had indicated that he would work together with learned counsel for the respondent The USA with respect to the framing of the jurisdiction issue to be raised as a preliminary issue in the Industrial Court.

[202] We exercised our discretion and made no order as to costs for this appeal.